INDEX.

CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

DAVID SHAPIRO, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 93.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

ARGUMENT.

In this brief the Government admits for argument's sake merely that the court *assumed* to accept the plea of nolo contendere *when* offered, and concedes that the supplemental record it recently filed shows that the court and parties *proceeded* to a hearing under, and that the court bedded its sentence upon those *assumed* pleas. Nevertheless the alleged jeopardy did not exist; or if it ever existed it is now unavailing.

I.

June 21, 1910, an indictment of thirteen counts was filed, each count stating a different offense.

The tenth charged an offense punishable by *fine alone*. All the other counts were so-called "prison counts" and felonies as defined in the Tucker opinion (196 Fed. 262; Sug. Dim. Record, printed p. 26.) Confusion may arise on account of an erroneous reference on page 3 of Shapiro's brief in opposition to the motion to dismiss, to section *3286* Rev. Stat. [the section should be 3296 Rev. Stat. (R. 7)]; and also to section 3317 Rev. Stat. (when the reference should be to an amendment of that section enacted in 1879—20 Stat. 229.) These corrections make what would otherwise appear to be "misdemeanor-fine" counts actually "felony-prison" counts.

June 24, 1910, Shapiro plead "not guilty" to every count. *January 3, 1911* (R. 9), by leave of court he withdrew the plea of "not guilty"; was re-arraigned, and "pleads nolo contendere."

Because it simplifies the argument, let us assume that the thirteen different offenses were stated in thirteen different *indictments* rather than counts. The plea of "not guilty" made a proper issue. The withdrawal of the pleas destroyed those issues. The defendant was bound to answer *each* offense and indictment by lawful plea. The *court had no power to accept*, nor the district attorney to consent to, other than a legally allowable plea. In *United States* v. *Mayer*, No. 462, October term, 1914, decided November 16, 1914, this court said:

> The *subsequent proceeding* was *in effect a new proceeding which, by reason of its char-*

> *acter, invoked an authority not possessed.* * * * As the District Court was without *power* to *entertain* the *application* the consent of the United States Attorney was unavailing.

In the Tucker opinion (196 Fed. 266, 267; Sug. Dim. Rec. printed pp. 36-37) the court said:

> The *case for such allowance must* be within the class of *misdemeanors* for which the punishment may be imposed by *fine alone*. * * * So defined, the *rule affords no ground for entertaining* the *plea* (nolo contendere) either in cases of *felony* * * * or in cases of *misdemeanor for which* the *punishment must be imprisonment* for any term, with or without a fine.

In the Tucker case, speaking of *five* counts that *remained* to the end, the court said (267):

> So it was within the authority of the prosecuting officer to elect to stand for the purposes of the plea, *on the counts applicable thereto*, and was plainly within the *jurisdiction of the court to approve such* submission. (Sug. Dim. Rec. printed p. 39.)

Per contra, as to counts to which the plea was not applicable, the United States Attorney lacked authority to consent to the plea and it was not within the *jurisdiction of the court* to accept it.

Shapiro could only escape *each* assumed indictment by (1) acquittal; (2) conviction, or plea of guilty, or other equivalent and legally-acceptable plea; or (3) dismissal. The assumed case then on

January 3, 1911, stood thus: Rearraigned on thirteen indictments, Shapiro interposed a plea of nolo contendere to each. This was not in law any answer to twelve of the indictments. The court had no power to accept it and the United States Attorney could not lawfully assent to it, as to twelve. And as to twelve, the case stood before the law as if no plea had been offered or entered to any of them. It was, as to them, a case of arraignment without plea. Had the United States Attorney on January 4, 1911, then realized the office of that plea and moved to strike the plea as to each of the twelve indictments the court could only have sustained the motion and ordered a proper plea—*one that would support the prison sentence demanded by the law*. In this event the ultimate result *now obtaining* would have been achieved in the first instance.

To the remaining fine indictment the plea was proper and could have been assented to by the United States Attorney, and accepted by the court. But on *January 20, 1911*, (R. 10) the United States Attorney dismissed that single fine indictment, together with all the prison indictments save 4, 9 and 12; and the defendant by the court was "discharged from further prosecution" under those so dismissed. That dismissal *did not in fact*, and *could not in law* be construed to include 4, 9 and 12, because (a) all parties and the court, later went ahead to judgment and sentence, showing that no one then believed they were dismissed; (b) indictments 4, 9, and 12, could not have been affected by

any order under any *other indictment* in *any other* case; (c) if count 10 (the fine count) had been dismissed *before* the original plea of "not guilty" was withdrawn this would not have carried the other indictments (counts) with it or relieved the defendant of responding to them, or changed the rule as to pleas allowable to them. No more can it do so in case of *after* dismissal. The case in law, *then* stood without any issue as to indictments 4, 9 and 12. On the same day the court proceeded to a hearing on assumed pleas *not legally existing*. It plainly appears from the supplemental record that the court, all the lawyers, and the client each then thought that the pleas were authorized to prison counts and would warrant a prison sentence. (Sug. Dim. Rec., printed pp. 59, 118, 121–122, 123, 124.) On *January 23rd* the court imposed a fine and prison sentence. *No other sentence was authorized by law* for the offenses charged in indictments 4, 9, and 12. There was no verdict; there was no jury trial; and *in law*, there was no plea. Therefore, there was nothing between the information and the judgment and sentence to support the latter.

Mere arraignment can not make jeopardy. There was here no jeopardy by verdict. There was none by the unauthorized plea of nolo contendere (mistakenly tendered, and which the United States Attorney was powerless to assent to, and the court was powerless to accept). There was nothing on which to base a claim of jeopardy until the judgment and sentence. That judgment was either valid, void, or

voidable. If valid or voidable there was jeopardy; but only *until* that judgment was reversed at Shapiro's instance. If void, there never was jeopardy, and Shapiro could have gained release on habeas corpus. While the lack of jury trial, verdict, and opportunity of full defense *to the merits*, distinguishes this case from the Garland case (232 U. S. 644)—also a case of no plea—the decision of the Circuit Court of Appeals is conclusive here that this judgment was not valid against direct review. We are not concerned to know whether it was void or voidable, because Shapiro *on direct review secured its reversal.* (196 Fed. 268–269.) Thus *by Shapiro's own hand perished* the *only action* that *might have made for jeopardy.* In the *Lange* case (18 Wall. 173–4) the fine had been *wholly paid* and the law did not authorize *both* fine *and* imprisonment. The court said:

> But there is a class of cases in which a *second trial* is had *without violating this principle, as when* * * * *the verdict* (is) *set aside* on motion of the accused, or *on writ of error prosecuted by him*, etc. * * * The power of the court over that judgment was just the same whether it was void or valid.

Those three indictments (counts), 4, 9, and 12, were never dismissed. Shapiro was never acquitted of the offense charged in each. The *law demanded* a *prison* sentence which he could only escape by acquittal or dismissal of those charges. No mistakenly tendered and unauthorized plea, and no

action of court or counsel thereunder, could operate to relieve him of the demand of the law for prison sentence. Mistakes can not change the law. As the mistake of the Government in assuming that the plea warranted a prison sentence (though this belief was then concurred in by Shapiro and his counsel) could not aid it to uphold the judgment in the Circuit Court of Appeals, no more can the mistake of Shapiro (though concurred in by the Government) as to the effect of the court's action in assuming to accept this plea to a prison count, give the plea greater efficiency or availability than the law gives it, or thereby aid Shapiro to a claim of jeopardy on *that* plea *against those charges*.

II.

The Circuit Court of Appeals mandate read:

> The *judgment* of the said district court * * * *is hereby reversed* * * * and and that this cause is hereby remanded * * * with direction *either* to *accept* or *refuse acceptance* of the nolo contendere plea as *tendered* and *proceed further* in conformity with law. (R. 15; 196 Fed. 268–9.)

Shapiro says the lower court could *only accept* the plea *despite the mandate*—and this because (1) it had in fact, long before the review in the Circuit Court of Appeals accepted the plea, and (2) no other course would be "in conformity with law."

The language "in conformity with law" does not modify the clause "either accept or refuse acceptance of the nolo contendere plea as tendered," but rather the words "and *proceed further*" and is limited to those proceedings to occur *after* the earlier clause has become "*functuo officio*," by *either* acceptance or rejection of the plea.

As to the first contention: To so hold would be to make (1) the *unauthorized* act of a judge in accepting such a plea to a prison count a valid and lawful judicial act; and (2) to make the unauthorized acceptance operate to *alter the law* so as to warrant *a fine sentence only* for an offense demanding imprisonment *under the law*.

Suppose on the remand the District Court had *accepted* the plea as is now said it should have done. Shapiro would then have been in position to claim either (1) that he could *not be sentenced at all*, because *the law demanded imprisonment* whereas the accepted plea *forbade imprisonment;* or (2) that he could only be fined under the plea—thereby, though admitting guilt, escaping the sentence *demanded by the law* for the offense confessed. Appreciation of these possible consequences may have moved the court to take the course it did.

Really instead of being only entitled to accept the plea, the court could *only lawfully reject that plea* under the mandate. And this because the plea as defined by the Circuit Court of Appeals, could not be lawfully accepted to the three indictments (counts) then before it.

(Of course, the Circuit Court of Appeals overlooked the distinction between the Tucker and Shapiro cases, in the absence of any *fine* count in the latter; else its mandate must have been "to *reject* the plea and proceed further in conformity with law." Tucker case, 196 Fed 267; Sug. Dim. Rec. 38, 39; Shapiro case, 196 Fed. 268.)

Shapiro asks this court to disregard the alternative mandate to "either accept or refuse acceptance" and to read the mandate as compelling the lower court to a second acceptance. He does this because of extraneous events transpiring prior to the writ of error from the Circuit Court of Appeals, demonstrating, he insists, a previous acceptance by the lower court of the plea. Equally, then, may the Government insist that the same events be analyzed to show that such attempted acceptance was beyond the power of the court in twelve of the cases and that lawfully it could only have rejected the plea as to them in the first instance, and, therefore, under the mandate, it could only reject. Especially is this so since the decision of the Circuit Court of Appeals to the effect that the plea was not legally acceptable to the prison counts was *sought* and *procured by Shapiro himself*.

III.

And this brings us to Shapiro's attitude in the Circuit Court of Appeals.

He now claims that his only contention in that court was that there should be but a fine sentence. He is refuted by his printed brief. Under the

heading " Points " page 3, et seq., the following among others were made:

> III. Nolo contendere is *not* a *plea* that *could be taken* in a *felony* sentence either under the common law or statute.
>
> IV. The *only plea* upon which sentence of *imprisonment* could be pronounced against the defendant in a criminal case *after* the withdrawal of a plea of not guilty, *would be a plea of guilty.* This was *not done* in this case. On the contrary, the *record shows that evidence was heard* by the court, and *that the court*, upon hearing of the evidence, *found the defendants guilty.* This the court could not do. Whether the defendants were *guilty or innocent was a question to be submitted to a jury.*

The first black type heading under his brief of argument (p. 6) was the following:

> The District Court upon the condition of this record *had no jurisdiction* to *pass judgment* in the aforesaid causes.

And a further black type heading on page 16 read:

> Nolo contendere *not being a plea no issue was presented* to the court and *no plea in fact was made* before trial and sentence.

To this point Shapiro cited, and liberally quoted from *Crain* v. *United States*, 162 U. S. 625–650.

And finally, under the black type heading " Sentence is excessive," he argued (p. 18):

> If it should be held that * * * nolo contendere is applicable in felony cases

> * * * then it is respectfully submitted that the District Court erred in imposing a penitentiary sentence.

No refined argument will avoid the force of the first and second assignments of error in the Circuit Court of Appeals (his brief p. 2) or the plain statement of Shapiro's position in that court as evidenced by the above quotations from his brief.

He made two prominent contentions. (1) He challenged the power of the court to receive that plea to those counts. (2) If the plea could be entertained the judgment pronounced was excessive.

And the Court of Appeals correctly interpreted his position in that regard. (196 Fed. 262.) The claim that the sentence was excessive and should be limited to a fine only was a separate contention urged in the event the power to accept the plea and sentence under it, should be upheld. Shapiro's brief before the Circuit Court of Appeals was a forcible argument for the very position we have hitherto taken in this brief and he sucessfully inclined that court to that view and so secured a reversal.

IV.

No amplification of the Government's original brief is needed as to the plea of former jeopardy by alleged compromise. The effect of the plea on the motion to dismiss will be considered in VI infra.

V.

As to that portion of the second plea of former jeopardy advancing the retention of $5,000 by the Government, as a partial satisfaction of the fine judgment:

On *May 2, 1911,* the Circuit Court of Appeals vacated the supersedeas as to the fine. Execution issued and the Dearborn National Bank was garnisheed. The garnishment was later released. (R. 24–26.) The collector of internal revenue then had $5,000 which *Shapiro* had previously, and in *September* and *December, 1910,* deposited in connection with the compromise offer. (R. 21.) The plea alleges that the Government retains this amount. The *same officer* (collector) who *received it* from Shapiro *still holds* it. It was in his hands at the time of the withdrawal of the plea of "not guilty," the tender of the plea of nolo contendere, the hearing, and the original judgment and sentence—indeed, during every proceeding in the cause after the original plea of "not guilty." Shapiro *voluntarily placed it there.* The collector had no authority *to use it* in part payment of the *fine judgment,* nor was it ever so used. And finally, Shapiro himself, secured a *reversal of the whole judgment* so that there is nothing upon which the $5,000 deposit could now be applied nor could the Government after the reversal, have proceeded to impound or apply the $5,000 *upon* a *judgment which no longer existed;* nor could it have collected

in any manner the excess of the former fine judgment of $10,000. *Not a single case* cited by counsel *involved* a *judgment reversed* or *vacated* at the *instance of the prisoner*. Every case (save *Whitney* v. *State*, brief, p. 36) arose upon habeas corpus, and in every one, including the Whitney case, the sentence or some specific part thereof, or a later *second* increased sentence, was attacked as void. In the *Parks*, *Morse* and *Tweed* cases the *whole valid part* of the sentences had been entirely satisfied before the habeas corpus petition was filed. In the *Lange* case the sentence was fine *and* imprisonment. The law only authorized one *or* the other, and one alternative (sentence) had been fully satisfied. In all the other cases the petitioners were remanded. The *Weymouth*, *Rice*, *Cannon* and *Whitney* cases involved increased sentences imposed by the judge after the imposition of the original sentence, and either after the expiration of the term of court at which the original sentence was pronounced or after the commitment of the defendant under it. In Sennott's case the court held that the sentence was not excessive; that the remedy should be by writ of error and not habeas corpus. And the italicized reference by that court to the *Lange* case was a mere dictum and an erroneous analysis.

In the case at bar, conceding that the retention by the collector of the money deposited with him by Shapiro was a partial payment of the fine—as

it was not—nevertheless, even had it been received by the clerk through the marshal, and applied by the former on the fine sentence, and covered into the Treasury as court moneys, it would only have satisfied one-half of a fine, which was itself *a part* only, of a composite fine and imprisonment sentence expressly authorized by law. Moreover the *whole* sentence was later annulled at Shapiro's instance. The effect of this plea on the motion to dismiss will be next considered.

VI.

In support of the jurisdiction of this court in direct review, Shapiro contends that his second and third grounds of alleged double jeopardy, are not vulnerable to the motion to dismiss. This contention is unsound for two reasons: (1) Neither ground presents a genuine constitutional question; and (2) there is no distinction between them and the first ground in this regard.

1. An offer of compromise without the advice or consent of the Secretary of the Treasury or the recommendation of the Attorney General, though accepted by the commissioner, is on its face no compromise. Therefore a denial of that plea does not raise a real or substantial constitutional question such as is necessary to confer jurisdiction. (*Goodrich* v. *Ferris*, 214 U. S. 71, 79; *American Sugar Refining Co.* v. *United States*, 211 U. S. 155, 161, 162; and *Kaufman & Sons Co.* v. *Smith*, 216 U. S. 610.) Nor does mere retention by the collector of money

deposited with him by Shapiro on the latter's offer of compromise, without any impounding *and application* on the fine sentence before Shapiro secured its reversal, constitute any fair basis for claim of jeopardy; and certainly not to perpetuate jeopardy *beyond* such a reversal; and the denial of this plea likewise raises no substantial constitutional question.

2. While the second and third grounds of the jeopardy pleas were not before the Circuit Court of Appeals, no more was the first. Nor was it essential that either should have been before that court.

In *Union Trust Co.* v. *Westhus*, 228 U. S. 523, 524, this court said:

> It is insisted, however, that in both the Aspen and the Alton cases, the questions which it was sought to review by direct appeal after the decision of the Circuit Court of Appeals, had been, either expressly or by necessary implication, *passed upon by that court*, and therefore were expressly foreclosed; while *here such is not the case, since the constitutional question was not in the case when it went to the Circuit Court of Appeals, but only made its appearance by an amendment to the pleadings after the decision of that* court. Granting the premise upon which the argument rests *the deduction is unfounded.* * * * The error comes from attempting after the case has been taken to the Circuit Court of Appeals and there decided, to resort to proceedings for

review which *under the statute are applicable only in case no such action* by the Circuit Court of Appeals *had been taken.*

As the events on which the first ground depended occurred before the decision of the Circuit Court of Appeals, so the offer of compromise and the deposit of the $5,000 were made even earlier and in September and December, 1910 (nearly a year and a half before the writ of error from the Circuit Court of Appeals); while the vacation of the supersedeas to permit the issue of execution was ordered by the latter court itself, and the garnishment was released long before its decision.

All three grounds of the pleas might have been advanced to the latter court on Shapiro's motion to release the mandate, or even long before by earlier motion. None of them were so presented.

The determination of each necessarily involved a canvass of what the court below could or could not do under the mandate—in the case of one plea as much as another. Upon each Shapiro in effect said: "Because of these happenings, if you 'proceed further in conformity with law' under this mandate, you must discharge me under the compromise plea, and either discharge me or impose only a fine under each of the other two." And if this court reviews, the action taken below must determine whether it was authorized and in conformity to the judgment and mandate of the Circuit Court of Appeals, in the case of each jeopardy plea.

CONCLUSION.

1. The plaintiff in error has sought the wrong avenue of approach to this court. 2. His plea of former jeopardy on every ground is unsound and unavailing. 3. The judgment of the district court should be affirmed.

WM. WALLACE, JR.,
Assistant Attorney General.

NOVEMBER, 1914.